IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Madan Lal vs. Mohan Lal & ors.

S.B. Civil Second Appeal No.129/1989 against the judgment and decree dated 11.8.1989 passed by the learned Addl. District Judge, Rajsamand in Civil Appeal No.12/86.

Date of Judgment: March 22, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. G.Vaishnav for the appellant.

REPORTABLE

BY THE COURT:

Though three substantial questions of law were framed while admitting the appeal on 17.7.1991 but decision on substantial question no.3 alone goes to the root of the matter because by this, the defendant, one of the legal representatives of the purchaser of the suit property, has raised objection about the effectiveness and enforceability of the final decree dated 19.3.1986 passed in Civil Original Suit No.153/71 which was filed by plaintiff Lalita. The plaintiff is seeking dismissal of the suit of the plaintiff on the ground that the plaintiff, despite obtaining final decree for partition on 19.3.1986, has not paid the requisite stamp duty for drawing partition decree in terms of the Section 2(15) of the Rajasthan Stamp Act, 1952 read with Article

45 as well as Article 51 of the Stamp Rules.

Brief facts of the case are that one Rukmani sold the property in question by registered sale-deed in favour of defendant Dev Kishan in the year 1960. At the time of sale of the property, the possession of the property was not delivered to the purchaser, therefore, the purchaser filed the suit for possession and according to the purchaser, he got possession of the suit property in execution of the decree passed in his favour in that suit in the year 1964. In the year 1965, the present plaintiff Lalita filed one suit for partition impleading said Dev Kishan as party. Since Lalita filed the suit for partition, therefore, she impleaded other co-sharers as party in the suit. Except the purchaser, all other defendants remained ex parte. The trial court passed the preliminary decree in the year 1968 in the plaintiff Lalita's suit. The plaintiff in preliminary decree was directed to pay the Commissioner's fee within 15 days but since the plaintiff did not pay the Commissioner's fee, therefore, the plaintiff's suit was dismissed by the trial court and no final decree for partition was passed by the court. The plaintiff, therefore, preferred appeal against the dismissal of plaintiff's suit which was allowed by the appellate court and the appellate court upheld the finding of the trial court about 1/3rd share of the plaintiff in the suit property. It is stated by the respondent that in said suit, relief of possession was not granted to the plaintiff and only her share was

declared.

After above litigations, the plaintiff Lalita filed present suit for partition which was decreed by the trial court on 11.5.1975 after rejecting defendant's objection about non-maintainability of the second suit for partition as in earlier suit, final decree for partition was not passed by the court. In present suit, in the preliminary decree, the plaintiff was directed that the plaintiff shall deposit Commissioner's fee within 15 days failing which the plaintiff would stand deprived of her share. In the preliminary decree, further direction was given that after partition by meets and bound the Commissioner would deliver physical possession of the property to the plaintiff. This decree dated 11.5.1975 was challenged by the purchaser Dev Kishan which was partly allowed by the appellate court on 31.3.1978 and the direction given by the trial court to the Commissioner to deliver physical possession of the property on site to the plaintiff to the extent of share of her, was deleted. The trial court on receipt of the record from the appellate court on 22.6.1979, ordered that no further step is required, therefore, the file be consigned to record. It will be worthwhile to mention here that admittedly by that time, final decree was not passed by the trial court in the suit.

On 22.1.1981 the plaintiff applied for preparation of final decree. Before this, the contesting defendant died on 3.2.1980.

Therefore, in this application, the legal representatives of deceased Dev Kishan were impleaded as parties defendant. In this proceeding on 2.1.1984, suit against other defendant except the appellant and his mother Ganga Bai, was dismissed. That order of dismissal of suit against some of the co-sharers was not challenged by the plaintiff. It will be relevant to mention here that even the appellant, son of said purchaser Dev Kishan filed an application before the trial court on 22.7.1985 for dismissal of the suit as having abated, but that application was dismissed by the trial court and ultimately, the final decree was passed on 19.3.1986. Admittedly, the requisite stamps were not submitted by the plaintiff for drawing the decree on stamp papers.

The appellant's contention is that the final decree was passed by the trial court on 19.3.1986 and the plaintiff has not paid the stamp duty for drawing the decree sheet, therefore, in view of the Division Bench judgment of this Court delivered in the case of Smt.Suraj Bai v. Radha Kishan (1977 WLN 682), the suit of the plaintiff stands dismissed. It is submitted that not only the plaintiff has not paid the stamp duty for drawing the decree sheet dated 19.3.1986 immediately after the passing of the final decree by the trial court but the stamp duty has not been paid when the objection was raised by the appellant by filing appeal against the decree dated 19.3.1986. Further the appellate court, instead of dismissing the plaintiff's suit for partition, merely partly allowed the

appeal of the appellant on 11.8.1989. In first appeal, there was specific objection of the appellant legal representative of the original defendant Dev Kishan that in view of the Division Bench judgment of this court, the suit stands dismissed. The appellant has not paid the requisite stamp duty nor requested for extension of time for payment of stamp duty.

The same question came up before this Court in Smt. Suraj Bai's case (supra).The Division Bench of this Court held that while preliminary decree for partition which merely declares the shares of the members of the family, is not a final order effecting partition amongst the members of joint family, and therefore, is not an instrument of partition, within the meaning of section 2(15). The final order is such an instrument for effecting partition and therefore the final decree in partition is required to be engrossed on non-judicial stamp paper of required value under Art. 45 of the Stamp Act. The Division Bench of this Court considered several earlier judgments on this question of law and held that the High Courts, in all the cases, have unanimously taken the view that a final decree for partition should be engrossed on a non-judicial stamp under Art.45 of the Stamp Act, because it is an instrument of partition within the meaning of section 2(15) of the Act. The Division Bench of this Court also considered the question whether that non-judicial stamp for drawing final decree is required to be paid when the decree is passed by the final court and not only by the court of original jurisdiction. The

Division Bench held that where the final decree is passed by the court of first instance, it would have to be engrossed on a non-judicial stamp and further held that from this decree there may be appeal to the High Court or even to the Supreme Court which may modify or set aside the final decree for partition, but it cannot be said by any stretch of imagination that the appellate decree passed by the High Court or the Supreme Court are final decrees in a suit for partition, therefore, it is only once and never thereafter that a final decree in a suit for partition would have been engrossed on a non-judicial stamp and that too in the court of first instance and no where else. The Division Bench held that the words 'final order' referred to in definition of an instrument of partition contained in section 2(15) of the Rajasthan Stamp Act, which includes a 'final order for effecting a partition' passed by 'any civil court', means the final order of the lowest court of original jurisdiction, empowered to give an order for effecting partition, under Order 20 Rule 18, C.P.C., i.e., the court of first instance, and not orders passed by the highest court of appeal. The Division Bench held that the reason for this is that the duty once paid on the final decree for partition would enure to the benefit of all the parties at the subsequent stages of the suit. It was argued before the Division Bench that in case the stamp duty will be paid for preparation of final decree at first instance, in the first court,i.e. Trial court and ultimately it is set aside by the appellate court

then the stamp duty will go waste, for which the Division Bench held that as per sections 49 to 55 of the Rajasthan Stamp Act read with rule 51 of the Stamp Rules of the same Rules, if the decree is set aside by the High Court or the Supreme Court, the party would be entitled to get the refund, and for purpose of getting the refund, the law allows a reasonable period of two years.

In addition to above, the crucial question decided by the Division Bench in Smt. Suraj Bai's case (spra) is that if any one of the parties to the suit fails to comply with the legal directions of the court, by not supplying the requisite stamps for drawing decree for partition, the suit for partition qua him will become liable to be dismissed under Order 17 Rule 3 ,C.P.C. In a partition suit, the position of the defendant is also that of the plaintiff. If a defendant or a plaintiff fails to pay the stamp duty, he will not be able to obtain final decree in regard to his share and the final decree will be drawn only in regard to his share and the final decree will be drawn only in regard to the shares of the remaining parties to the suit. The defaulting party will acquire no title nor he will be entitled to enforce his rights through the courts. Admittedly, in the present suit, the plaintiff has not paid the stamp duty for drawing final decree on stamps, therefore, the plaintiff by her default, is not entitled to enforce his rights through the courts despite proving her case for entitlement to the share in the property before the trial court and

obtaining the decree dated 19.3.1986.

In view of the above reasons, since there is no decree which can be acted upon affecting the partition or could have been appealed because preferring appeal is also in substance acting upon the decree, therefore, even the first appeal preferred by the appellant Madan Lal son of the purchaser Dev Kishan was not maintainable and this appeal is also not maintainable as the decree sheet has not been engrossed on stamps, the stamps which could have been supplied by the plaintiff to the extent of her share and by the defendant to the extent of his share in the property but consequence of this is that the plaintiff fails because of the reason that the plaintiff's decree for partition cannot be acted upon on the basis of said decree.

In view of the above reasons, substantial question no.3 is decided in favour of the appellant and against the plaintiff and consequently, it is held that the appeal of the present appellant without payment of the stamp duty is not maintainable and it is also held that dismissal of second appeal of the appellant cannot give life to the decree obtained by the plaintiff, which became unenforceable because of the non-payment of the stamp duty by the plaintiff.

In view of the above the appeal of the appellant is dismissed.

(**PRAKASH TATIA),J.**

mlt.